UNITED STATES MISSION TO THE UNITED NATIONS
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The United States Mission to the United Nations presents its compliments to the United Nations and has the honor to refer to the Secretariat's note LA/COD/48 dated January 15, 2010, regarding a request for information and observations from Governments on certain issues regarding the topic, "Expulsion of Aliens," under consideration by the International Law Commission. The Government of the United States hereby presents its comments and requests the Secretariat's assistance in transmitting this response to the International Law Commission.

The United States Mission avails itself of this opportunity to renew to the United Nations the assurances of its highest consideration.

Enclosure

DIPLOMATIC NOTE

Response of the United States of America to the request of the International Law Commission for information and observations on issues concerning expulsion of aliens identified in chapter III of the report of the International Law Commission on the work of its sixty-first session

(a) <u>The grounds for expulsion provided for in national legislation</u>.

U.S. statutory law concerning the expulsion of noncitizens generally appears in the Immigration and Nationality Act (INA), which is codified as title 8 of the United States Code (U.S.C.). U.S. law does not use the term "expulsion." Instead, the process provided by the INA is known as "removal," and the available grounds of removal for noncitizens depends upon whether they have been admitted to the United States. "Admission" is the lawful entry of the noncitizen into the United States after inspection and authorization by an immigration officer. *See* INA § 101(a)(13); 8 U.S.C. § 1101(a)(13). Noncitizens who arrive in the United States or who are present within the territory of the United States without having been admitted are inadmissible and may be removed. Noncitizens who have been admitted, including lawful permanent residents of the U.S., may be removed if they fall within one or more grounds of "deportability."

There are ten broad grounds of inadmissibility, each of which has a number of subcategories:

- Health-related grounds, such as communicable disease carriers, INA § 212(a)(1); 8 U.S.C. § 1182(a)(1);
- Criminal grounds, such as individuals who have been convicted of crimes involving moral turpitude or controlled substance offenses, INA § 212(a)(2); 8 U.S.C. § 1182(a)(2);
- National security and related grounds, such as individuals believed to have engaged in espionage or terrorist activity or belonging to terrorist organizations and individuals who have participated in genocide, torture, or extrajudicial killings, INA § 212(a)(3); 8 U.S.C. § 1182(a)(3);
- Noncitizens likely to become a public charge, INA § 212(a)(4); 8 U.S.C. § 1182(a)(4);
- Noncitizens seeking employment in the United States without proper certifications, INA § 212(a)(5); 8 U.S.C. § 1182(a)(5);
- Noncitizens who have failed to comply with admission rules, such as those who have entered the United States without permission, procured or

attempted to procure admission through fraud, or engaged in smuggling noncitizens into the United States; INA § 212(a)(6); 8 U.S.C. § 1182(a)(6);
- Noncitizens lacking valid immigration documents to enter or be present in the United States, INA § 212(a)(7); 8 U.S.C. § 1182(a)(7);
- Noncitizens who are permanently ineligible for U.S. citizenship; INA § 212(a)(8); 8 U.S.C. § 1182(a)(8);
- Noncitizens who have previously removed from the United States or who have accrued significant periods of unauthorized presence; INA § 212(a)(9); 8 U.S.C. § 1182(a)(9); and
- Noncitizens who have engaged in or intend to engage in certain other activities contrary to the public interest, such as polygamy, international child abduction, and renunciation of U.S. citizenship to avoid taxation; INA § 212(a)(10); 8 U.S.C. § 1182(a)(10).

There are six general grounds of deportability, which overlap to some degree with the grounds of inadmissibility. These include:

- Noncitizens who were admitted but were ineligible for admission at the time that they were admitted such as those who procured admission because they concealed their inadmissibility. Noncitizens may also be deported where they become inadmissible because they fail to comply with the conditions of their admission, or engaged in certain types of illegal behavior such as smuggling of individuals into the United States or marriage fraud. INA § 237(a)(1); 8 U.S.C. § 1227(a)(1);
- Noncitizens who have been convicted of certain crimes following their admission, including crimes involving moral turpitude, certain controlled substance offenses, certain particularly egregious crimes (these are defined as "aggravated felonies" in U.S. law at INA § 101(a)(43); 8 U.S.C. § 1101(a)(43)) and domestic violence offenses. INA § 237(a)(2); 8 U.S.C. § 1227(a)(2);
- Noncitizens who failed to comply with registration requirements, falsified documents, or falsely claimed to be a U.S. citizen. INA § 237(a)(3); 8 U.S.C. § 1227(a)(3);
- Noncitizens who pose a threat to U.S. security or other interests, such as those who have engaged in espionage or terrorist activity, whose presence or activities are believed to have potentially adverse foreign policy consequences for the United States, or who participated in Nazi persecution, genocide, or acts of torture or extrajudicial killing. INA § 237(a)(4); 8 U.S.C. § 1227(a)(4);

- Certain noncitizens who have become public charges within five years of their entry into the United States. INA § 237(a)(5); 8 U.S.C. § 1227(a)(5); and
- Noncitizens who have voted without authorization in any U.S. political election. INA § 237(a)(6); 8 U.S.C. § 1227(a)(6).

Noncitizens determined to be "removable" from the United States (i.e., either inadmissible or deportable) may be able to qualify for certain waivers, immigration benefits, and forms of humanitarian immigration protection to excuse their removability or withhold their removal. These forms of relief come in many varieties and may require a noncitizen to demonstrate a certain period of physical presence in the United States, the existence of sponsoring employers or lawfully present family members, rehabilitation following criminal convictions, or a likelihood of persecution or torture if removed to a particular country.

(b) The conditions and duration of custody/ detention of persons who are being expelled in areas set up for that purpose.

(1) Conditions of Custody

- The United States is committed to safe, humane and appropriate detention of individuals who must be detained for reasons relating to their removal from the United States.
- The former Immigration and Naturalization Service, the authorities of which were transferred to the Department of Homeland Security in March 2003, initially drafted and published 36 National Detention Standards (NDS) in September 2000 to facilitate its provision of consistent conditions of detention, access to legal representation, and safe and secure operations across its detention facilities nationwide. Simultaneously, those standards also served to establish a clear baseline for the agency's review of detention operations in the field, so that each detention facility housing aliens that are expelled from the United States after being found to be removable could be held accountable for any noncompliance with those standards.
- Several years later, in 2008, after the dissolution of legacy INS and the formation of U.S. Immigration and Customs Enforcement (ICE), ICE reviewed and redrafted those standards based on lessons learned during the implementation of the NDS. Evidencing progression since the drafting of the original 2000 NDS, the revised detention standards, now known as the Performance Based National Detention Standards (PBNDS), were drafted in

consultation with different ICE components and the Department of Homeland Security's (DHS) Office of Civil Rights and Civil Liberties (CRCL). As part of the revision process, hundreds of concerns that were raised by nongovernmental organizations (NGO), among other interest groups were reviewed and addressed.

- Although the PBNDS are again currently under review and revision, based on additional feedback that ICE received from NGOs and legal rights groups among other stakeholders, the revision and prospective nationwide implementation of the PBNDS' is evidence of the U.S. Government's ongoing commitment to ensuring that all detained noncitizens are humanely treated.
- The U.S. law also affords particular protections for unaccompanied noncitizen children who arrive in the U.S. but are not admissible. In those circumstances, the Department of Health and Human Services' Office of Refugee Resettlement is responsible for placing such noncitizen children in the appropriate and least restrictive setting during any detention prior to removal.

(2) Duration of Custody

- Although DHS generally may detain noncitizens to ensure their appearance during the pendency of their immigration proceedings, in many instances noncitizens need not be physically detained by DHS throughout those proceedings. *See* INA § 236(a).
- For certain classes of noncitizens (such as those who pose a threat to the national security), U.S. law requires that they be detained pending issuance of an administrative order of removal. *See* INA § 236(c).
- Noncitizens arriving in the United States without a valid entry document may be subject to expedited removal. *See* INA § 235(b). If, however, the noncitizen establishes a credible fear of persecution or torture, the noncitizen will be afforded a normal removal hearing and, if he or she adequately establishes his or her identity and poses neither a flight risk nor a danger to the community, will be released from custody, save in exceptional circumstances.
- If a noncitizen, through the administrative process, is found to be in violation of U.S. immigration laws, in general they must be detained until they are removed (which generally must occur within ninety days of the final completion of the administrative process). *See* INA § 241(a)(1)(A), (2).

- Beyond these statutory parameters, U.S. Supreme Court precedent mandates that a noncitizen's detention (for purposes of removal) cannot be for an indefinite duration. More specifically, upon receipt of an administratively final order of removal, a noncitizen generally can only be detained so long as their removal is deemed significantly likely in the reasonably foreseeable future. Once it has been established that this condition cannot be met, the Supreme Court held that a noncitizen generally may not be further detained. *See Zadvydas* v. *Davis*, 533 U.S. 678 (2001).

(c) Whether a person who has been unlawfully expelled has a right to return to the expelling State.

- While the United States endeavors to ensure that removals always occur in strict accordance with the law, infrequent errors can occur. In such cases, an individual's ability to return to the United States will depend upon the facts and circumstances of the individual case. Where U.S. authorities determine that a noncitizen's removal did not occur in keeping with the law and the individual otherwise had a right to reside in the United States, they may undertake efforts to facilitate the individual's return to the United States. This could include the issuance of a travel permit. However, in cases where removal of a noncitizen without any underlying right to reside in the United States was not affected in accordance with the law, facilitation of the individual's return would be less likely. Additionally, noncitizens who illegally reenter the United States after removal may have limited ability to challenge their prior removal. *See, e.g.*, *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (en banc).

- In general, prior to removal from the United States, noncitizens have access to an administrative and judicial review process that takes into account the particular facts and circumstances surrounding their cases. Some noncitizens, including those encountered by authorities upon their arrival in the United States (or shortly thereafter), noncitizens who have been convicted of particularly egregious offenses, or noncitizens who have been previously removed from the United States, may be subject to removal under streamlined processes. However, like the standard administrative and judicial review process, such streamlined processes are designed to comply with U.S. nonrefoulement obligations by screening these groups of noncitizens for any potentially legitimate claims for humanitarian immigration protection consistent with U.S. obligations under the 1967

Protocol relating to Refugees and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See, e.g.*, INA § 235(b)(1)(A)(ii); 8 U.S.C. § 1225(b)(1)(A)(ii) (establishing a "credible fear" process for recently arrived noncitizens otherwise subject to expedited removal based upon fraud or a lack of valid immigration documents); 8 C.F.R. §§ 208.31 and 1208.31 (establishing a "reasonable fear" process for noncitizens subject to expedited removal based on aggravated felony" convictions and noncitizens who unlawfully reentered the United States following a prior removal).

- For those individuals not subject to a streamlined process, the U.S. administrative and judicial processes to determine noncitizens' removability and eligibility for relief from removal include administrative hearings and review by immigration judges, a Board of Immigration Appeals (BIA), U.S. Circuit Courts of Appeals, and the U.S. Supreme Court. The statutory provisions detailing the scope of administrative proceedings and judicial review are INA §§ 240 and 242; 8 U.S.C. §§ 1229(a) and 1252. Noncitizens may not be removed until administrative proceedings are complete. Noncitizens with administrative orders of removal who elect to pursue judicial review may do so from outside the United States or seek a judicial order staying their removal. *See Nken v. Holder*, --- U.S. ----, 129 S. Ct. 1749 (2009) (explaining four-part test courts should apply in deciding whether to stay removal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies). Where it is available, noncitizens who successfully pursue judicial review from outside the United States generally may return to the United States.

- A noncitizen whose administrative removal proceedings have concluded may seek to reopen those proceedings for a variety of reasons related to changes in the individual's circumstances or other developments affecting his or her removability or eligibility for relief from removal. Regulations generally require that an individual pursue reopening before removal from the United States. *See* 8 C.F.R. § 1003.2(d). However, in the limited circumstance where a noncitizen did not receive proper notice of the proceedings and was ordered removed *in absentia* on that basis, he or she may pursue reopening after removal. *See Matter of Bulnes*, 25 I. & N. Dec. 57 (BIA 2009). In the event that a motion to reopen the removal

proceedings of a removed noncitizen is granted, U.S. authorities may undertake appropriate measures to facilitate the individual's return to the United States.

(d) The nature of the relations established between the expelling State and the transit State in cases where the person who is being expelled must pass through a transit State.

- Prior to the removal of a noncitizen from the United States through a transit country, appropriate personnel at the U.S. Embassy in that transit country are electronically notified of the planned removal by U.S. immigration authorities. And, consistent with the cooperative principles underpinning the 1944 Chicago Convention on International Civil Aviation, U.S. Embassy personnel, in turn, generally provide notification to the transit country government of the removal.

- Beyond these general parameters, two unique scenarios bear mentioning. First, noncitizens arriving at a land border from a foreign country contiguous to the United States may be returned to that country, unless they have a credible fear of persecution or torture in that country, pending a determination by an immigration judge whether they were properly deemed inadmissible and whether they are eligible for a waiver or other immigration relief. INA § 235(b)(2)(C); 8 U.S.C. § 1225(b)(2)(C). Second, under Article 5(b) of the Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, sometimes referred to as the U.S.-Canada "Safe Third Country Agreement," a person being removed from the United States in transit through Canada who makes a refugee status claim in Canada will only be permitted onward movement to the country of removal by Canadian authorities if the person's refugee claim has already been rejected by the United States.

- Where a noncitizen is expelled by a third country and will transit through the United States, the noncitizen must have valid documentation (such as a transit visa) for their travel through the United States. Depending on the facts and circumstances, DHS may take appropriate measures to provide the necessary assistance and security to ensure that the noncitizen exits the United States in accordance with their travel documents.